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# In the Supreme Court of the United States

Term, 1988

RUSSELL T. THOMPSON and LOIS L. THOMPSON, his wife,

*Petitioners*

vs.

LUCINDA HAMMOND, Individually and in her official capacity as a Pennsylvania State Trooper; CORPORAL RONALD PROUGH, Supervising Officer of the Pennsylvania State Police, Individually and in his official capacity and COMMONWEALTH OF PENNSYLVANIA, PENNSYLVANIA STATE POLICE,

*Respondents*

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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## STATEMENT OF QUESTION PRESENTED FOR REVIEW

Does the law recognize a civil cause of action, arising under 42 U.S.C. §1983, based upon police investigation techniques which are calculated to overcome the resolve of an individual not to commit an offense; and if so, under what standard must the claim be evaluated in deciding whether it is legally sufficient to survive a motion for summary judgment?

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IN THE SUPREME COURT OF THE UNITED STATES

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RUSSELL T. THOMPSON and LOIS L. THOMPSON, his wife,

Petitioners

vs.

LUCINDA HAMMOND, Individually and in her official capacity as a Pennsylvania State Trooper; CORPORAL RONALD PROUGH, Supervising Officer of the Pennsylvania State Police, Individually and in his official capacity and COMMONWEALTH OF PENNSYLVANIA, PENNSYLVANIA STATE POLICE,

Respondents

---

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

---

*To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:*

The Petitioner, Russell T. Thompson, respectfully prays that a writ of certiorari issue to review the order of the United States Court of Appeals for the Third Circuit, entered in this proceeding on November 2, 1987.

## REFERENCE TO OPINIONS DELIVERED IN THE COURTS BELOW

Both the District Court for the Middle District of Pennsylvania and the Third Circuit Court of Appeals issued Opinions, which have not been officially reported. The Slip Opinions are reproduced in the Appendix hereto (App. pp. 1a and 7a).

The Superior Court of Pennsylvania's Opinion in the criminal case of *Commonwealth v. Thompson* is reported at 359 Pa. Superior Ct. 322, 484 A.2d 159 (1984), and is included in the Appendix at p. 21a for the Court's convenience.

## JURISDICTION

The Third Circuit Court of Appeals entered its Order affirming the decision of the District Court for the Middle District of Pennsylvania on November 2, 1987. This Petition for Writ of Certiorari was filed within ninety (90) days of that date. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

## CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

Amendment XIV to the United States Constitution:

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. §1983.

§1983. Civil Action for Deprivation of Rights.

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to the subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

## STATEMENT OF THE CASE

This case was brought by the Plaintiff, Russell T. Thompson, against Lucinda Hammond and others, alleging violation of civil rights pursuant to 42 U.S.C. §1983. The Federal Court for the Middle District of Pennsylvania was granted subject matter jurisdiction pursuant to 28 U.S.C. §1343, which gives the Federal Courts jurisdiction over federal questions, and appellate jurisdiction in the Third Circuit Court of Appeals was conferred by virtue of 28 U.S.C. §1291, since it involved an appeal from a final judgment of the District Court granting the Defendant summary judgment.

The controversy arises from an undercover investigation by the Pennsylvania State Police of Plaintiff, Russell T. Thompson, a former police officer of the Carlisle Police Department. As a result of the investigation and the conduct of Trooper Lucinda Hammond and her supervisor, Russell Thompson was prosecuted for delivering a small amount of marijuana to Lucinda Hammond. The appellate courts of Pennsylvania found that he had been entrapped as a matter of law. Some discussion of the underlying facts is in order.

In 1980, at the request of the Carlisle Borough Police, the Pennsylvania State Police began its investigation of Russell Thompson. Both Defendants Ronald Prough, who supervised the resulting investigation, and Lucinda Hammond, who did the investigatory work, admitted that they made no effort to substantiate any of the underlying allega-

tions. Mr. Thompson was, at that time, a police officer of ten years standing with a good reputation.

Corporal Prough had been apparently told that Russell Thompson might be offering drugs to women to attract them. For this reason, and because the informant was female, the Carlisle Police requested a female investigator. Corporal Prough complied with this request and assigned Lucinda Hammond to the case.

Lucinda Hammond testified during her deposition that it was Corporal Prough's practice to inform her if a woman investigator has been specially requested or was needed. In this particular case, he neglected to do so.

Thus began a ten-month investigation of Russell Thompson, which ultimately led to his arrest and conviction on a charge of delivering a very small amount of marijuana to Lucinda Hammond. The marijuana was for her personal use and Mr. Thompson neither made nor intended to make any money from the transfer. The conviction was ultimately overturned by the Superior Court of Pennsylvania on the ground that Russell Thompson had been entrapped *as a matter of law*. The Superior Court did this despite the lack of any Pennsylvania precedent reversing a jury finding that entrapment was not shown. The Pennsylvania Supreme Court refused to grant the Commonwealth's Petition for Allowance of Appeal. *See, Commonwealth v. Thompson*, reported at 335 Pa. Superior Ct. 332, 484 A.2d 159 (1984).

The Superior Court, in summarizing the undisputed facts from the trial manuscript, also delineated the conduct which forms the gravamen of this action:

> A careful review of the record in this case reveals no significant discrepancy in testimony of the

Commonwealth's sole witness (Trooper Hammond) and of appellant regarding the course of conduct between the two over a ten-month period. Appellant was a middle-aged black male and the trooper was a young, blonde, attractive female. A series of meetings and telephone calls occurred over a ten month period, all at the initiative of Trooper Hammond. Drugs were constantly discussed. Although it is not always clear who brought the subject up on each occasion; what is clear is that beginning on September 29, 1980, Hammond began requesting drugs from the appellant. By early 1981, and perhaps earlier, Hammond began to chide and criticize appellant for his consistent failure to obtain or provide drugs. Beginning in late 1980 or early 1981, the two began kissing after each meeting. Hammond also permitted appellant to put his arm around her, walked around in public with him, and socialized with his friends.

This testimony regarding Hammond's course of dealings is uncontradicted. In fact, testimony of Hammond and appellant corroborate each other, as both agreed as to dates and locations of meetings, the clothes worn by Hammond on different occasions, the approximate time the kissing began, her repeated requests for drugs and criticism of his failure to provide them, etc. The critical question, of course, is whether or not this uncontradicted testimonial evidence of police conduct establishes entrapment as a matter of law. (Footnotes omitted.)

* * *

[3] In light of all this, and under the facts of this case, we are convinced that the methods employed by

the Commonwealth constitute entrapment as a matter of law. The Commonwealth, acting through Trooper Hammond, pursued a long term, persistent course of persuasion and inducement aimed at luring appellant into delivering marijuana to Hammond. The use of a young, blonde female to coax a middle age male, after months of kissing and socializing, into committing a minor crime is not police conduct which presents the 'mere opportunity' to commit a crime. As this case clearly shows, opportunity and inducement are two separate consequences of police activity. The latter occurred here.

Furthermore, this is not a case like Manley where the police were unaware of the importuning of a government agent (often an informant) involved in the investigation. Not only was Trooper Hammond obviously aware of her actions and of appellant's interaction with her, she also admitted to suspecting the effect her conduct was having on appellant, i.e., romantic or sexual desires.

We are satisfied that appellant has successfully invoked the defense of entrapment by proving 'by a preponderance of evidence that his conduct occurred in response to an entrapment.' 18 Pa.C.S. §313(b). This burden was clearly met by the unconflicting testimony of both appellant and Trooper Hammond. See, Commonwealth v. Berrigan, supra, 234 Pa. Super. at 381, 343 A.2d at 361 (Hoffman, J., opinion in support of reversal) (testimony of government informant sufficient to meet defendant's burden).

The law enforcement authorities clearly strayed beyond the limits of acceptable practice in this case.

> We cannot sanction methods of inducement such as this, which lure otherwise law-abiding citizens into crime. Here the appellant has conceded his guilt, as he must when the entrapment defense is invoked under the objective test. Commonwealth v. Jones, supra, 242 Pa. Super. at 314, 363 A.2d at 1286. However, it is the Commonwealth that is guilty of the greater evil of playing an ignoble part. Sherman v. United States, supra, 356 U.S. at 380, 78 S.Ct. at 824 (Frankfurter, J., concurring).

*Commonwealth v. Thompson, supra*, 484 A.2d at 164, 166.

The trial transcript is, of course, much more descriptive of Trooper Hammond's methods. It details the alluring outfits she wore; her increasing persistence that he get some drugs for her, and a corresponding increase in their intimacy; and ultimately, a belief on his part that she desired to be his mistress. This is not to say that the policewoman shared his feelings, but she was aware of them and willing to use them to her advantage. She also permitted him to kiss and hold her, which is compelling evidence that she wanted to make an arrest at any cost.

Although Thompson's sentence was small, and even that was overturned, the practical effect upon his life was devastating. He lost his job and was not able to recover it despite recourse to the local Civil Service Board. His reputation in the community took a sharp plunge and he became the object of ridicule; in short, a lifetime of effort and accomplishment was lost.[1]

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[1] The Third Circuit characterized Mr. Thompson's civil rights claim as one for backpay only (Slip Opinion, p. 4). However, this is not a correct characterization of the damages sought, although the precise relief available is not at issue.

The lower Court agreed that the material facts were not in dispute, and characterized the issue as whether or not, as a matter of law, the circumstances stated a constitutional claim. The Court cited the admonition that the Federal Courts should "exercise scrupulous restraint before . . . denounc[ing] law enforcement conduct as constitutionally unacceptable." *See*, p. 5 of the District Court's Opinion (App. p. 5a). The District Court concluded, "[a]fter having reviewed the facts of this case, we are unable to conclude that the police conduct in the instant case reached the level of outrageousness sufficient to constitute a due process deprivation." *See*, p. 5. of the District Court's Opinion (App. p. 5a). No analysis of the facts or further explanation were presented

The Third Circuit Court of Appeals reviewed this Court's analysis of the relationship between due process and the defense of entrapment, as contained in a line of cases beginning with *Sorrells v. United States*, 287 U.S. 435 (1932), and which continues with *Sherman v. United States*, 356 U.S. 369 (1958), *United States v. Russell*, 411 U.S. 423 (1973), and *Hampton v. United States*, 425 U.S. 484 (1976). The Third Circuit then conceded two points vital to Russell Thompson's claim: (1) that a majority of this Court would recognize a due process defense if it were shown that the police's over-involvement in the commission of a crime could be characterized as "outrageous;" and (2) that such a due process violation could presumably give rise to a suit for damages under 42 U.S.C. §1983.

The Court of Appeals proceeded to compare the state's conduct in the Thompson investigation with that of the government's agents in other cases, including *United States v. Twigg*, 588 F.2d 373 (3d Cir. 1978); *United States v. Prairie*, 572 F.2d 1316 (9th Cir. 1978); *United States v.*

*Johnson*, 565 F.2d 179 (1st Cir. 1977), *cert. denied*, 434 U.S. 1075 (1978). *United States v. Jannotti*, 673 F.2d 578 (3d Cir. 1982) *cert. denied*, 457 U.S. 1106 (1982); *United States v. Beverly*, 723 F.2d 11 (3d Cir. 1983). The Circuit Court of Appeals concluded that the facts in this case more closely resembled those cases in which the criminal defendant's right to be treated in a fundamentally fair manner had not been abridged.

Petitioner believes that the Third Circuit's disposition of this case is flawed, and the reason lies in the existence of several questions left unresolved by the Supreme Court in its prior decisions, as well as some new issues which have not received much prior analysis.

## REASON FOR GRANTING THE WRIT

This case is fundamentally different from every prior decision which has considered the relationship between the defenses of deprivation of due process and entrapment, because it is a civil case for money damages. The question of whether a due process violation occurred cannot be avoided by ordering reversal of a criminal conviction by finding entrapment as a matter of law. In *Sorrells*, *supra*, and *Sherman*, *supra*, the Court was presented with facts directly analogous to those in this case. In each instance, government agents developed a personal relationship with the defendants, and played upon their sympathies to overcome their initial reluctance to commit an offense. In *Thompson*, the state police woman spent ten months of sexually teasing the defendant before he capitulated to her demand for drugs. He finally arranged to provide her with a small amount of marijuana for her personal use and without any monetary benefit to himself.

The Supreme Court in *Sorrells* and *Sherman* concluded that the defendants had been entrapped and reversed their convictions, but found it unnecessary to rule on whether the reversals should rest on larger constitutional principles. Similarly, in the *Thompson* criminal case, the Superior Court of Pennsylvania found entrapment as a matter of law and was not required to make any constitutional pronouncements. *See*, *Commonwealth v. Thompson*, 335 Pa. Superior Ct. 332, 484 A.2d 157 (1984).

In two other decisions, *Russell*, *supra*, and *Hampton*, *supra*, the majority of this Court apparently affirmed that

outrageous police conduct could give rise to a defense based upon lack of fundamental fairness, but ultimately decided that the defendants had been neither entrapped nor deprived of due process. In fact, in *Hampton*, the defendant had apparently conceded his predisposition to commit the crime charged, and appealed solely on the due process issue.

The Circuit Courts of Appeals which have considered the due process defense have, for the most part, rejected it as being factually inapplicable; but at the same time, these courts have found that the defendants were not entrapped. *See, Jannotti, supra, Beverly, supra, Prairie, supra,* and *Johnson, supra. See also, United States v. Leja*, 563 F.2d 244 (6th Cir. 1977); *United States v. Smith*, 538 F.2d 1359 (9th Cir. 1976). These decisions are thus closely related both in their facts and justification to this Court's rulings in *Russell* and *Hampton*.

In a few instances, the Courts of Appeals have upheld a due process defense regardless of the defendants' predisposition to commit a crime. In each of these cases, evidence of government overinvolvement in the creation of criminal activity was patent. *See, United States v. Twigg, supra,* where the government's agents became almost partners in crime, bankrolling and promoting drug operations and, thus, permitting the defendant to commit the charged offenses. *See also, Greene v. United States*, 454 F.2d 783 (9th Cir. 1971) and *United States v. West*, 511 F.2d 1083 (3d Cir. 1975).

In the instant case, the Third Circuit compared the government's activity in *Thompson* with that found in the two classes of decisions represented by *Jannotti* and *Twigg*, and concluded:

*Reason for Granting the Writ*

> Given this background of case law, we conclude that Thompson's constitutional right to due process was not violated by the police conduct that entrapped him. While we agree with the Superior Court of Pennsylvania that the government's deliberate use of sexual attraction to entice Thompson into committing a crime was reprehensible, we clearly cannot characterize the investigation of Thompson as 'the most intolerable [of] government conduct.' This case is *far* closer to the Jannotti case where the government only 'created the fiction that it sought to buy the commodity . . . that the defendants claimed they already possessed,' 673 F.2d at 608, than it is to the Twigg case where the government initiated and helped maintain a substantial enterprise that manufactured illicit drugs using government-supplied ingredients and distributed those drugs to government-supplied customers. Nor does the government's misconduct in this case involve the kind of invasion of personal privacy found to violate due process in Rochin v. California, supra.

Slip Opinion, pp. 12-13. (Emphasis in original.) (App. pp. 17a-18a.)

The Third Circuit has attempted to compare apples with oranges and has, therefore, missed the point. It is not Thompson's allegation that the Commonwealth of Pennsylvania was overinvolved in the commission of the crime because it provided such technical support and equipment as was necessary to perpetrate an offense. Rather, *Thompson* contends that the Commonwealth was overinvolved because of the outrageous pressure brought to bear upon his will, which in the end, overcame his reluctance to commit

even a very minor offense. This case presents the very issues which the Supreme Court declined to decide in *Sherman* and *Sorrells:* Can the government agent's efforts to overcome the defendant's reluctance to commit a crime constitute a violation of his right to due process of law? Unlike in *Sherman* and *Sorrells*, that issue must be evaluated in order to resolve the controversy at bar, which is a civil cause of action premised upon 42 U.S.C. §1983.

The question is brought into sharper focus by the nature of Pennsylvania's entrapment defense, which the Third Circuit correctly characterized as "an objective one which focuses on the conduct of the police and is not concerned with the defendant's state of mind." *See*, Slip Opinion at p. 4 (App. p. 10a). However, the key concern is whether such police conduct, objectively evaluated, creates "a substantial risk that such an offense will be committed by persons other than those who are ready to commit it." *See*, 18 Pa.C.S.A. §313(a)(2), which is part of §313 of the Pennsylvania Crimes Code. Thus, in deciding that Russell Thompson had been entrapped as a matter of law, the Pennsylvania Superior Court decided that the police woman's conduct, objectively evaluated, created a substantial risk that Thompson would commit a crime he was not otherwise prepared to commit.

The basis for reversing Thompson's conviction also suggests two other questions which have not been finally answered. First, if Pennsylvania's courts have determined that the government's conduct was unlawful under an objective standard, can a federal trial judge decide, on a Motion for Summary Judgment, that the conduct simply was not bad enough to constitute a due process violation? Both the District Court and the Court of Appeals believed so,

although Petitioner believes that each used incorrect criteria in evaluating the facts.

A second question raised, but not decided in either Court below, was whether the police woman was entitled to an official's qualified immunity, given the criteria announced in *Harlow v. Fitzgerald*, 457 U.S. 800 (1982). Petitioner argued below that the violation of an entrapment statute which objectively focused upon the police officer's conduct gives rise to an issue which cannot be decided on the defendant's Motion for Summary Judgment.

## CONCLUSION

This case presents important questions which require tha Court's attention. The Supreme Court is asked to decide whether the law recognizes a civil cause of action based upon outrageous police investigation techniques, which are calculated to overcome the resolve of an individual not disposed to commit an offense. Prior decisions have all arisen in the criminal arena. There, the Court was not required to rule on the due process claim because the government's overreaching constituted entrapment under the subjective test used in the federal system.

The issue of due process has persisted in the lower Courts in those cases where the defendant was disposed to commit the charged offense, but the government's role in aiding the crime was disturbing. The Third Circuit analyzed this case in light of those decisions, which measure a due process claim by the degree to which the government aided a criminal venture. By this standard, Russell

Thompson's claim will fail; but if judged by a standard which considers the police's methods in overcoming his reluctance to commit crime, his claim may well succeed.

Because this Court has never established in just what way an individual under investigation is entitled to due process of law, the Court of Appeals was confused about the standard by which to evaluate Russell Thompson's claim. It is respectfully requested that this Court finish the work it began in *Sorrells* and *Sherman*.

Respectfully submitted,
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## CERTIFICATE OF SERVICE

I, hereby certify that on this 23rd day of December, 1987, five (5) copies of the Petition for Writ of Certiorari were mailed, postage prepaid, to John G. Knorr, III, Esquire, Senior Deputy Attorney General, Office of Attorney General, Strawberry Square, 15th Floor, Harrisburg, Pennsylvania 17120. I further certify that all parties required to be served have been served.

ANGINO & ROVNER, P.C.
(s) NEIL J. ROVNER
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# APPENDIX

## IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA CIVIL ACTION NO. 85-1807

RUSSELL T. THOMPSON and
LOIS L. THOMPSON, his wife,

Plaintiffs

vs.

LUCINDA HAMMOND, Individually and in her official capacity as a Pennsylvania State Trooper; JOHN DOE, et al., Supervising Officers of the Pennsylvania State Police, the identity of whom is presently unknown to Plaintiff; and COMMONWEALTH OF PENNSYLVANIA PENNSYLVANIA STATE POLICE,

Defendants

## MEMORANDUM

*Introduction and Background*

Presently pending is the motion of defendants, Lucinda Hammond, Corporal Prough and the Pennsylvania State Police for summary judgment pursuant to Fed. R. Civ. P. 56. This action arises from an undercover investigation by the State Police of plaintiff, Russell Thompson, a former police officer of the Carlisle Police Department. The investigation was conducted by Trooper Hammond under the direction of her supervisor, defendant Prough. The first contact between the parties occurred in

June 1980, when Trooper Hammond traveled to Carlisle for the purpose of forming a relationship with Mr. Thompson. Thereafter, Trooper Hammond and Officer Thompson had a number of meetings where they discussed drugs and plaintiff's purported ability to obtain drugs for her. The investigation culminated on March 23, 1981 when Thompson delivered 4.5 grams of marijuana to Trooper Hammond. Thompson was arrested and charged with unlawful delivery of a Schedule I controlled substance and conspiracy. [1]

At the state court criminal trial Thompson did not deny giving Trooper Hammond the marijuana, but claimed he had been entrapped. This defense was unsuccessful and Thompson was convicted on September 23, 1981. He appealed his conviction to the Pennsylvania Superior Court which reversed his conviction, holding that as a matter of law the conduct of Trooper Hammond constituted entrapment. In this regard, the court stated that:

> [W]e are convinced that the methods employed by the Commonwealth constitute entrapment as a matter of law. The Commonwealth, acting through Trooper Hammond, pursued a long term, persistent course of persuasion and inducement aimed at luring appellant into delivering marijuana to Hammond. The use of a young, blonde female to coax a middle age male, after months of kissing and socializing, into committing a minor crime is not police conduct which presents the "mere opportunity" to commit a crime. As this case clearly shows, opportunity and inducement are two

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[1] For a more detailed account of the investigation the reader may refer to *Commonwealth v. Thompson*, 335 Pa. Super. 332, 484 A.2d 159 (1984).

separate consequences of police activity. The latter occurred here.

*Commonwealth v. Thompson*, 335 Pa. Super. 332, 344, 484 A.2d 159, 166 (1984).

Armed with the Superior Court's decision, plaintiffs initiated this action alleging a violation of Russell Thompson's civil rights under 42 U.S.C. §1983. The complaint also sets forth several state law claims which are not before us.[2] It is plaintiffs' contention that defendants' conduct was outrageous and hence repugnant to the principles of due process. Defendants, on the other hand, have taken the position that their conduct did not rise to the level of a constitutional violation and that, in any event, they are immune from damages. They also raised the statute of limitations as a defense. The material facts are not in dispute and we will grant the motion for summary judgment based upon the discussion which follows.[3]

*Discussion*

In order to state a cause of action under §1983 plaintiff must establish that (1) he was deprived of a constitutionally protected interest (2) by a person acting under color of state law. *Parratt v. Taylor*, 451 U.S. 527, 68 L.Ed. 2d 420, 101 S.Ct. 1908 (1981). The critical inquiry here is whether plaintiffs have demonstrated that Russell Thompson was deprived of a constitutionally protected interest and we must weigh their assertion that Russell

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[2] By our memorandum and order of February 19, 1986, we remanded the state law claims to the Dauphin County Court of Common Pleas.

[3] The parties are in agreement as to the essential facts and any disputed issues of fact are immaterial.

Thompson's due process rights were violated by defendants' allegedly outrageous conduct.[4]

The seeds of the outrageous conduct doctrine or the due process defense were sown by the United States Supreme Court in *United States v. Russell*, 411 U.S. 423, 36 L.Ed. 2d 366, 93 S.Ct. 1637 (1973). There, the defendant was convicted of unlawfully manufacturing, selling and delivering methamphetamine. The court of appeals reversed the conviction because it found that the government's conduct (1) constituted entrapment and (2) offended the due process clause. Although the Court ultimately decided that the due process defense was not applicable under the circumstances of the case, it left open the possibility of such a defense:

> While we may some day be presented with a situation in which the conduct of law enforcement agents is so outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction, cf. Rochin v. California, 342 US 165, 96 L Ed 183, 72 S Ct 205, 25 ALR2d 1396 (1952), the instant case is distinctly not of that breed.

411 U.S. at 431-32, 36 L.Ed. 2d at 373, 93 S.Ct. at 1643.

According recognition to this principle, the Third Circuit in *United States v. Twigg*, 588 F.2d 373 (3d Cir. 1978) reversed the defendants' convictions on due process grounds. The court held that the "nature and extent of police involvement . . . was so overreaching as to bar prose-

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[4] In their brief plaintiffs also assert constitutional claims for deprivation of a property interest in Russell Thompson's governmental employment and for abuse of process. These claims have not been adequately stated in the complaint but in any event we find them without merit.

cution of the defendants as a matter of due process of law." *Id.* at 377. Despite the decision in *Twigg*, the precise nature of the due process defense is unclear. The Supreme Court has admonished the federal judiciary not to exercise " 'a Chancellor's foot' veto over law enforcement practices of which it does not approve." *Russell*, 411 U.S. at 435, 36 L.Ed. 2d at 375, 93 S.Ct. at 1637. "[A] successful due process [claim] must be predicated on intolerable government conduct" and a federal court should "exercise scrupulous restraint before . . . denounc[ing] law enforcement conduct as constitutionally unacceptable." *United States v. Gambino*, 788 F.2d 938, 945 n.6 (1986) (quoting *United States v. Janotti*, 673 F.2d 578, 607 (3d Cir.), *cert. denied*, 457 U.S. 1106, 73 L.Ed. 2d 1315, 102 S.Ct. 2906 (1982)). After having reviewed the facts of this case, we are unable to conclude that the police conduct in the instant case reached the level of outrageousness sufficient to constitute a due process deprivation. In reaching this decision, we do not condone the defendant's conduct in this action, but merely find that it was not so egregious as to offend the United States Constitution. Accordingly, we find that plaintiffs have failed to establish that Russell Thompson was deprived of a constitutionally protected interest and will grant summary judgment in favor of defendants.[5]

An appropriate order will be issued.

(s) William W. Caldwell
William W. Caldwell
United States District Judge

Date: January 7, 1986

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[5] Because we conclude that plaintiffs cannot state a cause of action under §1983 we will not address the remaining issues raised by defendants.

*Memorandum, U.S. District Court*
*Order and Judgment*

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA
CIVIL ACTION NO. 85-1807

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RUSSELL T. THOMPSON and
LOIS L. THOMPSON, his wife,

Plaintiffs

vs.

LUCINDA HAMMOND, Individually and in her official capacity as a Pennsylvania State Trooper; JOHN DOE, et al., Supervising Officers of the Pennsylvania State Police, the identity of whom is presently unknown to Plaintiff; and COMMONWEALTH OF PENNSYLVANIA PENNSYLVANIA STATE POLICE,

Defendants

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ORDER AND JUDGMENT

AND NOW, this 7th day of January, 1987, it is ordered that:

1) Defendants' motion for summary judgment is granted and judgment is hereby entered in favor of defendants.

2) The pre-trial conference and trial scheduled in this matter for January 8 and 12, 1987 are cancelled.

3) The Clerk of Court shall close this file.

s/William W. Caldwell
William W. Caldwell
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

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No. 87-5103

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THOMPSON, RUSSELL T. and
THOMPSON, LOIS T., his wife,

Appellants

vs.

HAMMOND, LUCINDA, Individually and in her official capacity as a Pennsylvania State Trooper; PROUGH, CORPORAL RUSSELL, Supervising Officer of the Pennsylvania State Police, Individually and in his official capacity; and COMMONWEALTH OF PENNSYLVANIA, PENNSYLVANIA STATE POLICE

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On Appeal from the United States District Court For the Middle District of Pennsylvania—Scranton
(Civil Action No. 85-1807)
District Judge: Honorable William W. Caldwell

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Submitted Under Third Circuit Rule 12(6)
October 6, 1987

BEFORE: WEIS and STAPLETON, *Circuit Judges*, and COHILL, *District Judge**

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* Honorable Maurice B. Cohill, Jr., United States District Judge for the Western District of Pennsylvania, sitting by designation.

*Memorandum Opinion, U.S. Court of Appeals*

## MEMORANDUM OPINION OF THE COURT

STAPLETON, J., *Circuit Judge*

Appellant Thompson is a middle-aged married man formerly employed as a police patrolman by the Borough of Carlisle. The Carlisle chief of police, Giordamo, "received a report" that Thompson was dealing in drugs. No effort was made to substantiate this information. Because drugs were concerned, Giordamo asked the Drug Unit of the Pennsylvania State Police to conduct an undercover investigation of Thompson. He requested that a woman be chosen for the job; the undercover agent assigned was an attractive young woman, State Trooper Hammond. Hammond socialized with Thompson over a ten-month period, permitting him to treat her almost as a girlfriend, and pressuring him throughout to obtain drugs for her. Despite Thompson's oft-asserted claims that he could get drugs for her, Hammond's efforts were without success until Thompson did finally get a friend of his to provide Hammond with a very small amount of pot. For this, Thompson was charged with unlawful delivery of marijuana and with criminal conspiracy.

After the drug charges were brought, the State Police reported back to Giordamo, who suspended Thompson until the next meeting of the Borough Council, the only entity with authority to dismiss a Carlisle police officer. Giordamo and the mayor of Carlisle met and agreed that Thompson's dismissal should be recommended to the Council. When the Council met to consider the issue two weeks later, in May of 1981, it had before it a letter from Thompson's attorney. This letter requested that the charges against Thompson not be publicly disclosed; it also said

that Thompson and his attorney had requested and received from the Carlisle Civil Service Commission a continuance of any hearing concerning Thompson's status until after disposition of the criminal charges. The Council dismissed Thompson at this time. Thompson appealed to the Commission, and, as he had requested, his hearing was delayed.

Five months after his dismissal, Thompson was reemployed by the Borough's Water and Sewer Department, at a wage substantially below what he had made as a patrolman. However, Thompson was, upon re-employment, considered to be a Borough employee of nine years' standing, on the basis of his years in the police department.

Thompson's civil service hearing was held in April of 1986 pursuant to 53 Pa. Cons. Stat. Ann. §46191 (Purdon's 1966 & 1987 Supp.). Back pay for the five-month interval during which Thompson was unemployed was the only issue before the Commission; Thompson had decided not to ask for reinstatement because he had at some point prior to the hearing been arrested and fined for soliciting a prostitute. Thompson was denied back pay by the Commission and did not appeal to the Pennsylvania state courts from the Commission's decision.

Thompson raised the defense of entrapment in pretrial and post-trial motions, as well as at trial. All of his motions were denied and the jury convicted him. On appeal, however, a three-judge panel of the Pennsylvania Superior Court held (one judge dissenting) that Thompson had been entrapped as a matter of law. *Commonwealth of Pennsylvania v. Thompson*, 335 Pa. Super. 332, 484 A.2d 159 (1984). The Pennsylvania statute under which Thompson was exonerated reads, in part:

> A public law official . . . perpetrates an entrapment if for the purpose of obtaining evidence of the commission of an offense, he induces or encourages another person to engage in conduct constituting such offense by . . . employing methods of persuasion or inducement which create a substantial risk that such an offense will be committed by persons other than those who are ready to commit it.

18 Pa. Cons. Stat. Ann. §313 (Purdon's 1966 & 1987 Supp.) (eff. 1973). The Pennsylvania courts have said that this test is an objective one which focuses on the conduct of the police and is not concerned with the defendant's state of mind. *Commonwealth v. Jones*, 242 Pa. Super. 303, 311, 363 A.2d 1281, 1285 (1976).

Thompson then filed this civil rights action, again claiming only back pay. Summary judgment was granted to defendants on the ground that Thompson had failed to establish a violation of his constitutional rights.

The initial inquiry in a §1983 action, as explained in *Parratt v. Taylor*, 451 U.S. 527, 535 (1981), focuses on (1) whether the conduct complained of was committed by a person acting under color of state law and (2) whether this conduct deprived a person of rights, privileges or immunities secured by the Constitution or laws of the United States. The second part of this inquiry is at issue here. Thompson alleges three bases for his claim that his constitutional rights were violated. The first is that the police conduct in entrapping him was a violation of due process; the second is that deprivation of his employment as a police officer was done without due process; the third is that there was abuse of process sufficient to support a §1983 claim.

## I. *ENTRAPMENT AS A VIOLATION OF THOMPSON'S RIGHTS*

The first time entrapment was discussed at any length by the Supreme Court was in *Sorrells v. United States*, 287 U.S. 435 (1932). The majority said that while "artifice and strategem may be employed to catch those engaged in criminal enterprises," "[a] different question is presented when the criminal design originates with the officials of the Government, and they implant in the mind of an innocent person the disposition to commit the alleged offense and induce its commission in order that they may prosecute." 287 U.S. at 441-42. The *Sorrells* majority chose to base this doctrine of entrapment on an implied exception to criminal statutes. Applying the rule that general terms in statutes are to be "so limited in their application as not to lead to injustice, oppression, or an absurd consequence" (at 447), the majority said:

> We are unable to conclude that it was the intention of the Congress in enacting this statute that its processes of detection and enforcement should be abused by the instigation by government officials of an act on the part of persons otherwise innocent in order to lure them to its commission and to punish them. We are not forced by the letter to do violence to the spirit and purpose of the statute.

287 U.S. at 448.

Justice Roberts wrote a concurrence to the *Sorrells* opinion in which he set forth an alternative base for the entrapment doctrine. Saying that the majority's theory "seems a strained and unwarranted construction of the statute; and amounts, in fact, to judicial amendment," Roberts would have justified reaching the same result

"based on the inherent right of the court not to be made the instrument of wrong." 287 U.S. at 456. According to Roberts, the doctrine of entrapment rests on a fundamental rule of public policy:

> The applicable principle is that courts must be closed to the trial of a crime instigated by the government's own agents. No other issue, no comparison of equities as between the guilty official and the guilty defendant, has any place in the enforcement of this overruling principle of public policy.

287 U.S. at 459. Roberts was joined in this opinion by Justices Stone and Brandeis, the latter of whom had taken a similar view in his dissent in *Casey v. United States*, 276 U.S. 413 (1928). (The *Casey* majority did not discuss entrapment at any length.)

*Sherman v. United States*, 356 U.S. 369 (1958), picks up from *Sorrells*. The majority in *Sherman* followed the *Sorrells* majority; Justice Frankfurter, joined in his concurrence by Justices Douglas, Harlan, and Brennan, eloquently urged the adoption of Justice Roberts' theory.

Next, in *United States v. Russell*, 411 U.S. 423 (1973), the Court for the first time considered a claim of a due process violation raised in connection with an alleged entrapment. Justice Rehnquist, writing for a 5-4 majority, said:

> [T]he Government's conduct here violated no independent constitutional right of the respondent. . . . While we may some day be presented with a situation in which the conduct of law enforcement agents is so outrageous that due process principles would absolutely bar the government from invoking judicial

> processes to obtain a conviction, cf. *Rochin v. California*, 342 U.S. 165 (1952) [illegal break-in into petitioner's bedroom, attempt to force petitioner's mouth open to remove pills, and forcible pumping of petitioner's stomach was due process violation as "conduct that shocks the conscience"], the instant case is distinctly not of that breed. . . . The law enforcement conduct here stops far short of violating that "fundamental fairness, shocking to the universal sense of justice," mandated by the Due Process Clause of the Fifth Amendment.

411 U.S. at 430-32 (quoting *Kinsella v. United States ex rel. Singleton*, 361 U.S. 234, 246 (1960) on "fundamental fairness"). According to Justice Rehnquist, it had been established in *Sorrells* and *Sherman* that entrapment involving government misconduct that falls short of shocking the conscience is not a matter of constitutional dimension, so that adopting the contrary position would require overruling both of those cases.

Again, the majority in *Russell* took the view that entrapment was "rooted . . . in the notion that Congress could not have intended criminal punishment for a defendant who has committed all the elements of a proscribed offense, but was induced to commit them by the Government" (at 435). And again, a good part of the Court was in disagreement. Justices Stewart, Brennan, Marshall, and Douglas, in dissent, expressed agreement with the Roberts/Brandeis/Frankfurter view; the first three of these joined in an opinion which, quoting the excerpt above from Justice Roberts' concurrence in *Sorrells*, said that since "it does not matter whether the respondent was predisposed to commit the offense of which he was convicted, the focus must be, rather, on the conduct of the undercover government agent." 411 U.S. at 446.

Finally, the Court dealt with entrapment and due process in *Hampton v. United States*, 425 U.S. 484 (1976). Justice Rehnquist, writing for a plurality that included Chief Justice Burger and Justice White, held that there could never be either entrapment or a valid due process claim where the defendant was shown to have been "predisposed" to commit the crime. This plurality read *Russell* as already having established that proposition. Justices Powell and Blackmun concurred on the lack of entrapment in this particular case, but refused to agree on the due process issue. They would leave open the possibility that if the government were guilty of outrageous conduct, fundamental fairness would permit the assertion of a due process claim by the defendant despite proven predisposition. 425 U.S. at 492-93. Powell noted, however, that:

> [C]ases, if any, in which proof of predisposition is not dispositive will be rare. Police overinvolvement in crime would have to reach a demonstrable level of outrageousness before it could bar conviction. This would be especially difficult to show with respect to contraband offenses, which are so difficult to detect in the absence of undercover Government involvement. One cannot easily exaggerate the problems confronted by law enforcement authorities in dealing effectively with an expanding narcotics traffic. . . . Enforcement officials therefore must be allowed flexibility adequate to counter effectively such criminal activity.

425 U.S. at 495-96 n.7. Justices Brennan, Stewart, and Marshall, in dissent, again advocated the "objective" approach to the defense of entrapment rather than the "subjective" concern with predisposition, and would have also have left open the possibility of a due process claim.

Thus, the prevailing view on the Supreme Court seems to be that a due process claim might indeed be raised to bar indictment or conviction in cases of entrapment involving police conduct so outrageous as to shock the universal sense of justice referred to in *Kinsella*. Such a claim exists, however, only in the rare case where there has been truly outrageous misconduct by government agents. While the due process aspect of entrapment has not yet been brought before the Supreme Court in an action under 28 U.S.C. §1983, presumably the same constitutional analysis applies.

There are several court of appeals decisions that are also helpful in the present context even though they too did not arise under Section 1983. One of the most important of these is this court's decision in *United States v. Twigg*, 588 F.2d 373 (3d Cir. 1978), the only post-*Hampton* court of appeals case in which it has been found that police conduct barred prosecution on due process grounds. The *Twigg* majority concluded:

> The contention that defendants raise which we find persuasive is that the nature and extent of police involvement was so overreaching as to bar prosecution of the defendants as a matter of due process of law. Although no Supreme Court decision has reversed a conviction on this basis, the police conduct in this case went far beyond the behavior found admissible in previous cases.

588 F.2d at 377. In the *Twigg* case, the government provided the single essential, and most difficult to obtain, ingredient for the production of methamphetamine, as well as 20% of the necessary glassware and an isolated farmhouse to serve as a laboratory. *Hampton* was distinguished

as involving only the elusive, fleeting sale of an illegal drug; in *Twigg*, where the establishment of a whole laboratory and large-scale drug distribution was involved, this court was of the opinion that the government did not need to use more extreme methods of investigation. According to the *Twigg* majority:

> The rule that is left by *Hampton* is that although proof of predisposition to commit the crime will bar application of the entrapment defense, fundamental fairness will not permit any defendant to be convicted of a crime in which police conduct was "outrageous."

588 F.2d at 378-79. On this point, the court cited *United States v. Prairie*, 572 F.2d 1316, 1319 (9th Cir. 1978) ("despite the lack of a majority opinion, we have read the *Hampton* opinions as permitting a due process defense based on the outrageous nature of the government's conduct," but government employment of a prostitute was not violative of due process) and *United States v. Johnson*, 565 F.2d 179, 182 (1st Cir. 1977), *cert. denied* 434 U.S. 1075 (1978) (government agents' pressuring of defendant to procure cocaine for them was not so outrageous as to constitute due process violation under *Hampton* and *Russell*).

This court next addressed the due process issue in *United States v. Jannotti*, 673 F.2d 578 (3d Cir. 1982), *cert. denied* 457 U.S. 1106 (1982). This court sitting in banc there held that the constitutional argument raised by the defendant in connection with his entrapment defense should be accepted by a court only to "curb the most intolerable government conduct." 673 F.2d at 608. The *Jannotti* court distinguished *Twigg* on the ground that in the latter, the government "initiated and was actively involved in the criminal enterprise itself," whereas in the former, an

ABSCAM case, the government merely "created the fiction that it sought to buy the commodity—influence—that the defendants claimed they already possessed." The *Jannotti* court was troubled by the government's tactics, but said that:

> We must necessarily exercise scrupulous restraint before we denounce law enforcement conduct as constitutionally unacceptable. . . . As citizens, we have differing views of the necessity or advisability of the entire ABSCAM project. As judges, however, we rule only on whether the limits which the Constitution places on another branch of government have been exceeded.

673 F.2d at 607, 610.

Finally, in *United States v. Beverly*, 723 F.2d 11 (3d Cir. 1983), we declined to reverse convictions for conspiracy to destroy and attempting to destroy a government building by fire even though a government agent solicited the defendant to burn the building and set the defendant up to be arrested in the act of attempting arson. In that case, although the court was again troubled by the methods employed by the government's agents, it nonetheless found that the police conduct did not sufficiently shock the conscience of the court or reach the level of outrageousness necessary to compel acquittal. 723 F.2d at 13.

Given this background of case law, we conclude that Thompson's constitutional right to due process was not violated by the police conduct that entrapped him. While we agree with the Superior Court of Pennsylvania that the government's deliberate use of sexual attraction to entice Thompson into committing a crime was reprehensible, we

clearly cannot characterize the investigation of Thompson as "the most intolerable [of] government conduct." This case is *far* closer to the *Jannotti* case where the government only "created the fiction that it sought to buy the commodity . . . that the defendants claimed they already possessed," 673 F.2d at 608, than it is to the *Twigg* case where the government initiated and helped maintain a substantial enterprise that manufactured illicit drugs using government-supplied ingredients and distributed those drugs to government-supplied customers. Nor does the government's misconduct in this case involve the kind of invasion of personal privacy found to violate due process in *Rochin v. California, supra*. Nor are we persuaded by Thompson's claim that "at a minimum, the jury should be permitted to decide whether the Appellant's Civil Rights have been abrogated" (Br. at 15). We agree with the position taken by the Court of Appeals for the First Circuit in *United States v. Johnson*, 565 F.2d 179, 181 (1st Cir. 1977), *cert. denied* 434 U.S. 1075 (1978), as it adopted Justice Brennan's language in his dissent in *Hampton:*

> [T]he determination of the lawfulness of the Government's conduct must be made— as it is on all questions involving the legality of law enforcement methods—by the trial judge, not the jury.

425 U.S. 484, 497 (1976) (quoting Justice Stewart's dissent in *Russell*, 411 U.S. at 441).

## II. *DEPRIVATION OF THOMPSON'S EMPLOYMENT WITHOUT DUE PROCESS*

Thompson further argues that his Section 1983 claim is sustainable on the ground that Hammond's conduct interfered improperly with Thompson's property interest in his employment. While there is no doubt that Thompson

did have such an interest, Thompson received all the process due him under law before being finally deprived of that interest.

Pennsylvania state law, 53 Pa. Cons. Stat. Ann. §§46190 and 46191 (Purdon's 1966 & 1987 Supp.), creates a property interest in Thompson's employment, but also provides for termination of that employment under specific circumstances and with certain procedural safeguards that clearly satisfy the minimum requirements of due process. Thompson does not allege that the proper procedures were not followed; he had a full hearing before the Civil Service Commission with an attorney present, and he had the opportunity to present his own testimony and evidence and to cross-examine witnesses against him. And as defendants point out, Thompson does not say to what additional process he should have been entitled.

## III. *ABUSE OF PROCESS*

Thompson's sole support for his abuse of process claim is Hammond's testimony "that one object of her investigation was to provide the Carlisle Police with enough information for the Borough to successfully dismiss him. (R. 252A)." (Br. at 16.) We read Hammond's testimony to assert that the object of the investigation was to confirm or refute the reports of Thompson's drug connections. Moreover, we have doubts as to whether police investigative techniques come within the concept of "process" referred to in the abuse of process cases. In any event, even if we shared Thompson's understanding of that concept and of Hammond's testimony, we could not conclude that the conduct about which he complains rose to the level of a constitutional violation. The case law on abuse of process establishes that an unconstitutional abuse of process occurs

only "if the misuse of the legal procedure is so egregious as to subject the aggrieved individual to a deprivation of constitutional dimensions." *Newton v. Liddel*, 620 F.2d 1375, 1378-79 (10th Cir. 1980). *See also Lessman v. McCormick*, 591 F.2d 605, 610 (10th Cir. 1979) (citing cases); *Jennings v. Shuman*, 567 F.2d 1213, 1217 (3d Cir. 1977) (misuse of legal procedure, which is a state law tort, may deprive a person of his federal constitutional right to procedural due process in egregious circumstances).

The judgment of the district court will be affirmed.

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TO THE CLERK:

Please file the foregoing Memorandum Opinion.

s/Walter K. Stapleton
Walter K. Stapleton
Circuit Judge

Dated:

**COMMONWEALTH of Pennsylvania**

v.

**Russell T. THOMPSON, Appellant.**

Superior Court of Pennsylvania.

Argued Feb. 22, 1984.

Filed Nov. 9, 1984.

Defendant was convicted in the Court of Common Pleas, Cumberland County, Criminal Division, No. 413, 1981, Sheely, J., of unlawful delivery of a small amount of marijuana and criminal conspiracy, and he appealed from judgment of sentence. The Superior Court, No. 02297 Philadelphia 1982, Montemuro, J., held that defendant was entrapped as a matter of law.

Reversed.

Wickersham, J., dissented and filed opinion.

**1. Criminal Law [key] 37(1)**

Test for entrapment is an objective one which focuses on conduct of police and will not be concerned with defendant's prior criminal activity or other indicia of a predisposition to commit crime. 18 Pa.C.S.A. § 313.

**2. Criminal Law [key] 739.1(1)**

Determination of whether police conduct constitutes entrapment is for jury, unless evidence of police conduct clearly establishes entrapment as a matter of law; after defense of entrapment has been properly raised, trial court should determine question as a matter of law wherever there is no dispute as to operative facts relating to the defense. 18 Pa.C.S.A. § 313.

**3. Criminal Law [key] 37(8)**

Defendant, who was subjected to persistent course of persuasion and inducement by young, blonde female undercover state trooper, after months of kissing and socializing, into delivering marijuana to her was entrapped as a matter of law. 18 Pa.C.S.A. § 313.

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Arthur L. Goldberg, Harrisburg, for appellant.

Gregory B. Abeln, Asst. Dist. Atty., Carlisle, for Commonwealth, appellee.

Before WICKERSHAM, MONTEMURO and MONTGOMERY, JJ.

MONTEMURO, Judge:

This is an appeal from the judgment of sentence of the Court of Common Pleas of Cumberland County. Because we find entrapment as a matter of law, we reverse.

On May 1, 1981, appellant, Russell Thompson, a former Carlisle policeman was arrested and charged with one count of unlawful delivery of a small amount of marijuana[1] and one count of criminal conspiracy.[2] Appellant was convicted by a jury on both counts on September 23, 1981. After his post-verdict motions requesting a new trial or an arrest of judgment were denied, he was sentenced on the drug conviction to a term of imprisonment of not less than fifteen (15) days nor more than thirty (30) days and was fined fifty dollars; the sentence was suspended generally on the conspiracy conviction. This timely appeal followed.

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[1] 35 Pa.C.S. § 780—113(a)(31).

[2] 18 Pa.C.S. § 903.

Appellant raises two issues:

> Did the [l]ower [c]ourt err in finding that under the facts in this case the police conduct in the investigation did not constitute entrapment as a matter of law?
>
> Did the lower court err in permitting the Commonwealth to elicit prejudicial, conjectural testimony from the Commonwealth witness?

Brief for appellant at 3.

The first issue, whether the state police conduct in question constituted entrapment as a matter of law, was raised in pre-trial motions, during trial by demurrer following the Commonwealth's case, in post-trial motions, and now on appeal. Appellant does not deny giving Trooper Lucinda Hammond a small amount of marijuana on the evening of March 23, 1981. Rather, he argues that the procurement and delivery of the marijuana were the result of a romantic relationship that developed on the part of the appellant, a relationship brought about by Hammond's conduct over a ten month period. Because we agree with appellant's contention that this conduct constituted entrapment, we need not reach the second issue he has raised.

Beginning on May 1, 1980, state police Trooper Lucinda Hammond became involved in an undercover investigation of appellant,[3] a 46-year-old black male who was married and living with his wife and mentally retarded daughter in Carlisle. At the time this investigation began,

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[3] It is not clear from the record why this investigation was ever started. Trooper Hammond's testimony simply states there were "accusations" regarding the appellant.

he was a ten-year veteran of the Carlisle Borough Police Force. Trooper Hammond was a young, blonde, white female who apparently was very attractive.

The undercover officer came to Carlisle on May 2, May 9, May 12, May 16, May 22, May 23, May 28, June 5, June 6, June 12, June 19, and June 25 of 1980 in an attempt to make contact with appellant. Although Trooper Hammond was unable to establish any direct communication with appellant, he did wave to her on May 22 and May 28. Her purpose in making contact with appellant on all these occasions was to determine if he would provide her with drugs.

Trooper Hammond's first "face-to-face" contact with appellant was on July 10, 1980 at the square in Carlisle. He was on duty and she approached him with a question about a false temporary driver's license which apparently was used as a pretext for starting a conversation. She testified that at the time her hair was long and straight and she wore mid-thigh cut-off shorts and a short-sleeved jersey. During the conversation which ensued, the two began talking about "partying" and having a good time. Appellant discussed with Hammond his purported use of marijuana and she let him know that she "partied" and "got high." He then told her he would be able to get drugs for her.

The second encounter between appellant and Hammond occured on August 8, 1980 when she again walked up to him while he was on duty. She was again dressed in cut-offs and a jersey. There was a brief conversation, but no mention of drugs. Sometime after this meeting, Hammond began to telephone appellant at his place of work, the Carlisle Police Station. These calls continued over the course of the investigation, totaling at least eight to ten in

all. Appellant never contacted Hammond and she never provided him with a means of doing so.

The third direct contact between them occurred on September 3, 1980, when she again walked up to him while he was working. She wore a blouse that was open in the back and shoulders, as well as her now standard cut-offs. Appellant recognized her immediately and started a friendly conversation which included a discussion of drugs and getting high. He tried to get her to meet him after work at a tavern called the Oliver Plunkett,[4] but she declined and instead arranged to meet him the next night at another tavern called Yancy's.

As had been arranged, they met and had drinks together at Yancy's on September 4. It was their fourth meeting and first date. Again the discussion turned to partying and getting high. Appellant stated to Hammond that he kept marijuana in his locker at work which he would seize during drug arrests and then use himself. This appears to have been mere braggadocio.[5] She asked if he was going to get some of this marijuana and he said no. He repeatedly, on that evening and throughout the investigation, indicated to her that he wanted her to trust him, that he might be a policeman, but he liked fun too. He assured her that he was not trying to set her up.

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[4] Trooper Hammond testified appellant repeatedly told her the Oliver Plunkett was the bar where drugs could easily be gotten after closing time. Despite appellant's constant requests that she meet him there after midnight, and despite her apparent familiarity with the bar, Hammond never went to the tavern with appellant.

[5] The record discloses no attempt by the state police to verify whether there was in fact marijuana in appellant's locker, and further, it appears uncontradicted on the record that during his tenure as a police officer, appellant had never even made a drug arrest.

The fifth direct contact occurred on September 29, after she had called him at the police station. They met again at Yancy's for a date, and she then asked him to obtain some marijuana for her personal use or "maybe make a little money on the side." (N.T., Trial at 28). He responded by again trying to get her to go to the Oliver Plunkett after hours with him, telling her she could get some marijuana if she would go with him. She declined to do so and left Yancy's.

The next and sixth personal contact did not occur until December 17, 1980. She had talked to him, however, on October 23 and 24, and, in another telephone conversation on November 25, had "point blank" asked him if he could make a deal for some drugs. On November 26 and December 3, she traveled to Carlisle looking for appellant but could not find him. At the December 17 meeting, when he was on duty, she again asked him about getting drugs. As before, he wanted her to meet him after midnight and she would not do so.

She met with him briefly on January 6, 1982 and arranged to meet him at Yancy's the next day. During that date at Yancy's, she began directly indicating to him that he "wasn't coming across" with any drugs. (N.T. Trial at 88). Possibly as early as October or November, but certainly by this date, she began chiding him, telling him he was "all talk" and never produced anything for her. She began to question appellant's ability to obtain drugs for her. He stated he would get some for her if she'd meet him again the next night. They did meet the following night, January 8, 1981, in a furniture store parking lot at the M.J. Carlisle Mall. On this eighth meeting between the two, she got into his car only to find he had no drugs. He indicated he would get them later in the evening, so they

went to the Hamilton Lounge together. When she indicated to him she was interested in getting something for herself for later that night, he made no moves to get any drugs, despite having earlier mentioned his "connection" was in the Oliver Plunkett right across the street. Instead, he questioned her about her social life. Before she left, she asked about paying for the drugs, but he assured her the drugs would not cost her anything.

It is clear from the testimony that on or about December 1980 or January 1981, they were kissing at the end of their dates or meetings, either at her car or while in his car. They were often seen together in public in Carlisle, and appellant would put his arm around her and introduce her to his friends. She concluded from his conduct that he was possibly interested in a romantic or sexual relationship,[6] although he always treated her respectfully. However, she never offered and he never requested sexual relations.

The telephone calls and meetings continued, with Hammond constantly requesting drugs and appellant just as consistently failing to provide them. She would insinuate that he couldn't get any drugs, while he again assured her no payment would be necessary for any drugs he pro-

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[6] Her testimony was as follows:

A. When I left, he would come out and he would say, well, good night. And he would give me a kiss good night.

Q. Did you get the feeling at that time that there was something more that interested him than the discussions about partying?

A. I can't say that I know what was going through his mind. I can only draw some sort of a conclusion.

Q. What conclusion did you draw?

A. Perhaps that he had—I don't know, perhaps I guess that he would have ideas of attemptimg to take me to bed, I don't know. (N.T. Trial at 73)

duced. Appellant kept up his entreaties, asking her to meet him after midnight and once to stay overnight, all of which she declined. On one occasion, she mentioned she felt ill and appellant offered to get her a motel room. Around this time, he also started suggesting to Hammond that she move to Carlisle.

Eventually, she arranged a meeting with him on the evening of March 23 at the Hamilton Lounge. She testified on direct examination that:

> A. After he made these statements about being able to take care of me as far as drugs were concerned, seeing how this was something I had heard from him on several occasions before I just really didn't take it that seriously. And I just said to him, well, you know, you are all talk. I have heard this before. And that's all I ever hear is just talk.
>
> And he said, well, I am going to show you that I am on the level here. He said I am going to get a dime bag of grass this evening. And while I was talking with him another individual entered the bar. . . .
>
> Q. The codefendant in this case?
>
> A. That's correct.
>
> Q. Go ahead, what happened next?
>
> A. And shortly afterwards [appellant] called over to Mr. Coleman. And he took a $10.00 bill out of his pocket and put it on the bar. And he said to Mr. Coleman, "I want you to get me a dime bag of grass."

(N.T. Trial at 12).

Appellant thereafter obtained 4.5 grams of marijuana from his friend, a Mr. Coleman, and gave it to Hammond.

Appellant and Hammond then left the bar and went to his car where he rolled some marijuana cigarettes with papers supplied by Hammond. She offered to pay for the marijuana, but he refused to accept any money.

The final meeting during the investigation was on April 11, 1981 at the Hamilton Lounge. This date had been pre-arranged by Hammond by phone. Appellant asked her how the marijuana was and whether she had any left. She replied that since it was such a little amount, there was no more left. He then talked of obtaining more drugs for her, but never produced any. The meeting ended after the two of them drove around Carlisle looking at apartments as appellant continued to talk about her moving there. Eventually, appellant offered to pay one-half of her rent if she moved to Carlisle.

We now turn our attention to the issue of entrapment.

The present test for entrapment is set forth in section 313 of the Pennsylvania Crimes Code, 18 Pa.C.S. § 313.[7] That section states in pertinent part:

> § 313. **Entrapment**
>
> (a) **General rule.**—A public law enforcement official or a person acting in cooperation with such an official perpetrates an entrapment if for the purpose of obtaining evidence of the commission of an offense, he induces or encourages another person to engage in conduct constituting such offense by either:
>
> (1) making knowingly false representations designed to induce the belief that such conduct is not prohibited; or

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[7] Act of December 6, 1972, P.L. 1482, No. 334, § 1, effective June 6, 1973, 18 Pa.C.S. § 313.

(2) employing methods of persuasion or inducement which create a substantial risk that such an offense will be committed by persons other than those who are ready to commit it.

**(b) Burden of proof.**—Except as provided in subsection (c) of this section, a person prosecuted for an offense shall be acquitted if he proves by a preponderance of the evidence that his conduct occurred in response to an entrapment.

[1] The test for entrapment in Pennsylvania under section 313 is an objective one which "focus[es] on the conduct of the police and will not be concerned with the defendant's prior criminal activity or other indicia of a predisposition to commit crime." *Commonwealth v. Jones*, 242 Pa. Super. 303, 311, 363 A.2d 1281, 1285 (1976); *see also Commonwealth v. Taylor*, 299 Pa. Super. 113, 445 A.2d 174 (1982); *Commonwealth v. Danko*, 281 Pa. Super., 97, 421 A.2d 1165 (1980); *Commonwealth v. Stokes*, 264 Pa. Super. 515, 400 A.2d 204 (1979); *Commonwealth v. Manley*, 252 Pa. Super. 77, 380 A.2d 1290 (1977), *vacated on other grounds*, 491 Pa. 461, 421 A.2d 636 (1980). This statute represented a significant shift in Pennsylvania law, in that it rejected the then-existing use of a subjective test in entrapment cases, i.e., a test which focused on the defendant's predisposition to commit the crime.[5]

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[5] *Commonwealth v. Jones*, 242 Pa. Super. 303, 310 n. 5, 363 A.2d 1281, 1285 n. 5 (1976). *See also Commonwealth v. Ferguson*, 289 Pa. Super. 163, 174 n. 3, 432 A.2d 1103, 1108 n. 3 (1981) (Hoffman, J., dissenting). The existence of these two tests demonstrates a sharp controversy over the proper theoretical basis and application of the defense of entrapment, a disagreement perhaps most clearly seen in a series of United States Supreme Court decisions dealing with the defense. *See United States v. Russell*, 411 U.S. 423, 93 S.Ct. 1637, 36 L.Ed.2d 366

[2] While the judicial focus in entrapment cases had changed, the case law has been consistent in Pennsylvania in holding that the determination of whether police conduct constitutes entrapment is for the jury, unless the evidence of police conduct clearly establishes entrapment as a matter of law. *Commonwealth v. Berrigan*, 234 Pa. Super., 370, 373-374, 343 A.2d 355, 357 (1975) (divided court) (applying subjective test); *Commonwealth v. Manley, supra*, 252 Pa. Super. at 87, 380 A.2d at 1294 (applying objective test). Thus, after the defense of entrapment has been properly raised, the trial court should determine the question as a matter of law wherever there is no dispute as to the operative facts relating to the defense.

A careful review of the record in this case reveals no significant discrepancy in testimony of the Commonwealth's sole witness (Trooper Hammond) and of appellant regarding the course of conduct between the two over a ten month period. Appellant was a middle-aged black male and the trooper was a young, blonde, attractive female. A series of meetings and telephone calls occurred over a ten-month period, all at the initiative of Trooper Hammond. Drugs were constantly discussed. Although it is not always clear who brought the subject up on each

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(1973); *Sherman v. United States*, 356 U.S. 369, 78 S.Ct. 819, 2 L.Ed.2d 848 (1958); *Sorrells v. United States*, 287 U.S. 435, 53 S.Ct. 210, 77 L.Ed. 413 (1932). This court, however, has clearly stated that the "present codification of entrapment [§ 313] finds its origin in Mr. Justice Frankfurter's concurring opinion in *Sherman*. . . ." *Commonwealth v. Jones, supra*, 242 Pa. Super. at 311, 363 A.2d at 1285. The objective test set forth there "shifts attention from the record and predisposition of the particular defendants to the conduct of the police and the likelihood, objectively considered, that it would entrap only those ready and willing to commit a crime." *Sherman v. United States, supra*, 356 U.S. at 383-84, 78 S.Ct. at 826-27.

occasion: what is clear is that beginning on September 29, 1980, Hammond began requesting drugs from the appellant. By early 1981, and perhaps earlier, Hammond began to chide and criticize appellant for his consistent failure to obtain or provide drugs. Beginning in late 1980 or early 1981, the two began kissing after each meeting. Hammond also permitted appellant to put his arm around her, walked around in public with him, and socialized with his friends.

This testimony regarding Hammond's course of dealings is uncontradicted.[9] In fact, testimony of Hammond and appellant corroborate each other, as both agreed as to dates and locations of meetings, the clothes worn by Hammond on different occasions, the approximate time the kissing began, her repeated requests for drugs and criticism of his failure to provide them, etc. The critical question, of course, is whether or not this uncontradicted testimonial evidence of police conduct establishes entrapment as a matter of law.

As Mr. Justice Frankfurter noted, this, "crucial question [is] not easy of answer." *Sherman v. United States*, *supra*, 356 U.S. at 382, 78 S.Ct. at 825. Answering that question is made all the more difficult by the fact that we

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[9] In rejecting appellant's motion for a new trial and motion in arrest of judgment, the trial court found "some conflicting testimony as to the extent of the parties' emotional involvement or assumed emotional involvement with each other and as to the effect this may have had on defendant's actions." Lower court opinion at 7-8. Without addressing appellant's second contention in this appeal, we note that this "conflicting testimony" relates not to the trooper's conduct and appellant's response to it, but rather to the supposed *state of mind* of this particular appellant. By considering the testimony, the lower court focused subjectively on appellant's mental state, and not on the conduct of the police as contemplated by the statute. Also, what appellant "thought" and what Hammond supposed he "thought" are not "conflicting" but only different.

have found no cases where either this court, or our supreme court, has found entrapment as a matter of law under the objective test of section 313.[10] Indeed the supreme court has never addressed the section 313 entrapment defense, except to intimate in passing that the statute changed Pennsylvania law in this area. *Commonwealth v. Herron*, 475 Pa. 461, 468 n. 2, 380 A.2d 1228, 1231 n. 2 (1977).

Some guidance can be found in the *Sherman* concurring opinion.[11] In that opinion, the objective test was said to be necessary in order to advance the ultimate goal which the doctrine of entrapment seeks to establish, i.e., "[p]ublic confidence in the fair and honorable administration of justice." 356 U.S. at 380, 78 S.Ct. at 825. The test, therefore, is aimed at condemning certain impermissible police conduct which, regardless of who may be induced by it to commit a crime, "falls below standards, to which common feelings respond, for the proper use of government power." *Id.* at 382, 78 S.Ct. at 825. Although entrapment necessarily must be decided on a case-by-case basis, impermissible activity may include "[a]ppeals to sympathy, friendship, the possibility of exorbitant gain and so forth." *Id.* at 383, 78 S.Ct. at 826.

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[10] Further muddying the waters in this area of the law, there appears to be some inconsistency in the way this court has applied the objective test of § 313, an inconsistency which has not gone unnoticed. *Commonwealth v. Taylor*, 299 Pa. Super. 113, 120-21 n. 2, 445 A.2d 174, 177-78 n. 2 (1982); *see also* Comment, *Entrapment: The Myth of the Model Penal Code in Pennsylvania*, 86 DICK.L.REV. 115 (1981); Ranney, *The Entrapment Defense—What Hath Model Penal Code Wrought?*, 16 DUQ.L.REV. 157, 158-61 (1977-1978); Park, *The Entrapment Controversy*, 60 MINN.L.REV., 163, 168 n. 16 (1976).

[11] See note 8, *supra*.

Courts in other states which have also adopted the objective test provide additional insight into its application.[12] For example, in *State v. Mullen*, Iowa, 216 N.W.2d 375, 382-383 (1974), the Supreme Court of Iowa stated:

> In adopting an objective test we do not intimate the transactional negotiations and conduct of the government official (or his agent) and the defendant shall be ignored. What was said, and the defendant's response to the inducements, should all be considered in judging what the effect of the government conduct would be on normally law-abiding persons. Depending on an evaluation of the facts in each case, prohibited governmental activity might include extreme pleas of desperate illness, appeals based primarily on sympathy, pity or close personal friendship, and offers of inordinate sums of money. (Citations omitted).

Finally, the opinions of this court addressing the entrapment defense provide us with direction in deciding, even if not providing examples of, the existence of entrapment. In *Commonwealth v. Manley, supra*, the appellant acted as middle-man in four drug sales to an undercover officer which occurred over a period of a month and a half. The transactions had been set up by an informant who was a friend of the appellant. Appellant argued entrapment, contending that he was induced by the informant's repeated requests for drugs. In finding no entrapment existed as a matter of law, the *Manley* court noted that there was no evidence indicating the undercover agent was aware of the

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[12] In addition to Pennsylvania, the objective test has been adopted by statute in Hawaii, New Hampshire and North Dakota. It has been judicially adopted in Michigan, Iowa, California and Alaska. Comment, *Causation and Intention in the Entrapment Defense*, 28 U.C.L.A. L.REV. 859, 862 n. 16 (1981). *See also* Park, *supra*, at 168.

number or type of requests made by the informant, nor that the agent had "encouraged [the informant's] repeated requests in order to wear down appellant's resolve." *Commonwealth v. Manley, supra*, 252 Pa. Super. at 87, 380 A.2d at 1294.

In *Commonwealth v. Stokes, supra*, we found no entrapment existed in a case where appellant sold heroin to an undercover agent. However, there the facts showed the officer had merely provided appellant with a market for the drugs by letting the appellant know he was interested in buying some heroin, and had never importuned appellant to make a sale.

Hense, *Stokes* reaffirmed the position, which was held in Pennsylvania prior to the enactment of section 313, that mere opportunity does not constitute entrapment. *See also Commonwealth v. Tami*, 309 Pa. Super. 341, 455 A.2d 641 (1982). We have also stated that "artifice and stratagem are legitimate tactics that may be employed by law enforcement officials to detect and combat crime." *Commonwealth v. Lee*, 262 Pa. Super. 218, 396 A.2d 724 (1978).

[3] In light of all this, and under the facts of this case, we are convinced that the methods employed by the Commonwealth constitute entrapment as a matter of law. The Commonwealth, acting through Trooper Hammond, pursued a long term, persistent course of persuasion and inducement aimed at luring appellant into delivering marijuana to Hammond. The use of a young, blonde female to coax a middle age male, after months of kissing and socializing, into committing a minor crime is not police conduct which presents the "mere opportunity" to commit a crime. As this case clearly shows, opportunity and in-

ducement are two separate consequences of police activity. The latter occurred here.

Furthermore, this is not a case like *Manley* where the police were unaware of the importuning of a government agent (often an informant) involved in the investigation. Not only was Trooper Hammond obviously aware of her actions and of appellant's interaction with her, she also admitted to suspecting the effect her conduct was having on appellant, i.e., romantic or sexual desires.[13]

We are satisfied that appellant has successfully invoked the defense of entrapment by proving "by a preponderence of evidence that his conduct occurred in response to an entrapment." 18 Pa.C.S. § 313(b). This burden was clearly met by the unconflicting testimony of both appellant and Trooper Hammond. *See, Commonwealth v. Berrigan, supra*, 234 Pa. Super. at 381, 343 A.2d at 361 (Hoffman, J., opinion in support of reversal) (testimony of government informant sufficient to meet defendant's burden).

The law enforcement authorities clearly strayed beyond the limits of acceptable practice in this case. We cannot sanction methods of inducement such as this, which lure otherwise law-abiding citizens into crime. Here the appellant has conceded his guilt, as he must when the entrapment defense is invoked under the objective test. *Commonwealth v. Jones, supra*, 242 Pa. Super. at 314, 363 A.2d at 1286. However, it is the Commonwealth that is guilty of the greater evil of playing an ignoble part. *Sherman v. United States, supra*, 356 U.S. at 380, 78 S.Ct. at 824 (Frankfurter, J., concurring).

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[13] See note 6, *supra*.

Judgment of sentence is reversed.

WICKERSHAM, J., files dissenting opinion.

WICKERSHAM, Judge, dissenting:

I would affirm on the opinion of the Cumberland County Court *en banc* by Honorable Harold E. Sheely, P.J.

No. 87-1073 (8)

Supreme Court, U.S.
FILED
JAN 29 1988
JOSEPH F. SPANIOL, JR.
CLERK

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1988

RUSSELL T. THOMPSON and
LOIS L. THOMPSON, his wife,

Petitioners

v.

LUCINDA HAMMOND, Individually and in her official capacity as a Pennsylvania State Trooper; CORPORAL RONALD PROUGH, Supervising Officer of the Pennsylvania State Police, Individually and in his official capacity and
COMMONWEALTH OF PENNSYLVANIA, PENNSYLVANIA STATE POLICE,

Respondents

# BRIEF IN OPPOSITION

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## QUESTION PRESENTED

On the facts of this case, did the courts below correctly decide that the conduct of the respondents was not "outrageous" within the meaning of United States v. Russell, 411 U.S. 423 (1979)?

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## STATEMENT OF THE CASE

1. This is a civil rights action arising out of an undercover drug investigation by the Pennsylvania State Police. Petitioner Russell T. Thompson seeks damages from the respondents, Trooper Lucinda Hammond and Corporal Ronald Prough of the State Police, on the theory that they violated his constitutional rights by entrapping him into committing a crime.

2. In 1980, the State Police began an undercover investigation of petitioner, then employed as a police officer by the Borough of Carlisle, Pennsylvania. The investigation was begun at the request of the Carlisle chief of police, and was carried out by Trooper Hammond, under the supervision of Corporal Prough. Pet. App. 1a, 8a.

Trooper Hammond, working undercover, met with Thompson on a number of occasions in 1980 and 1981. On these occasions, they repeatedly discussed drugs, and Thompson's purported ability to obtain drugs. On March 23, 1981, Thompson obtained 4.5 grams of marijuana and gave it to Trooper Hammond. He was arrested and charged with unlawful delivery of a Schedule I controlled substance, and conspiracy. Pet. App. 2a, 8a.

Thompson's defense was that Trooper Hammond had entrapped him. He raised this issue in pre-trial motions which were denied. He raised it again at trial, but was convicted by a jury. He raised it yet again in post-trial motions, but these also were denied. Pet. App. 2a, 9a.

On appeal, however, a three-judge panel of the Pennsylvania Superior Court reversed. The two judges of the majority held that there had been entrapment as a matter of law. The other judge dissented, adopting the opinion of the lower court, and would have held that there had been no entrapment. Commonwealth v. Thompson, 335 Pa. Super. 332, 484 A.2d 159 (1984); Pet. App. 2a-3a, 9a-10a.

In the meantime, the Borough of Carlisle suspended and then fired petitioner as a police officer. Petitioner appealed to the Borough's Civil Service Commission, but at his request, his hearing was delayed until after the disposition of the criminal charges. Pet. App. 8a-9a.

At some time before the hearing, however, petitioner was arrested and convicted of soliciting a prostitute, as a result of which he decided not to seek reinstatement as a police officer.[1] Pet. 9a. In addition, the Borough in the meantime had re-hired petitioner in a non-police capacity, so that the only remaining issue in his civil service appeal was his claim for back pay for the five-month interval during which he was unemployed. Ibid. After a hearing, the Civil Service Commission denied petitioner's request for back pay, and

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[1]Petitioner's statement that he was "not able" to recover his job "despite recourse to the local Civil Service Board," Pet. 8, is thus misleading.

petitioner did not appeal that decision. See Pa. Stat. Ann., tit. 53, § 46191 (Purdon 1986 Supp.)(right of appeal to court of common pleas).

3. The District Court granted the respondents' motion for summary judgment on all of petitioner's claims.[2] Petitioner's primary claim, and the only one before the Court, was that the respondents had violated the due process clause by entrapping him. In rejecting this claim, the District Court recognized that entrapment does not

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[2]In addition to the claim discussed in his petition, Thompson asserted a procedural due process claim and a claim based on a constitutional version of abuse of process. The District Court granted summary judgment to the defendants on these claims as well, Pet. App. 4a, n., and the Court of Appeals affirmed, Pet. App. 18a-20a. Petitioner has not pursued these claims in this Court.

ordinarily present an issue of constitutional dimensions, but that this Court had nevertheless left open the theoretical possibility that police misconduct could be "so outrageous that due process principles would absolutely bar. . . a conviction." Pet. App. 4a, quoting United States v. Russell, 411 U.S. 423, 431 (1973).

On the assumption that the same analysis would apply in a civil rights action, the District Court applied the Russell standard to the facts of this case and held that the respondents' conduct had not reached the "level of outrageousness sufficient to constitute a due process deprivation." Pet. 5a. The Court of Appeals, following the same analysis, affirmed. Pet. App. 11a-18a.

## ARGUMENT

1. According to the petitioner, the questions in this case are 1) whether police entrapment can serve as the predicate for a civil rights action and 2) if so, what standard governs such an action? Pet. i. Neither of these questions, however, is properly before the Court, because neither was addressed by the courts below or raised by any party.

In the courts below, the respondents assumed, for purposes of summary judgment, 1) that police entrapment could give rise to a civil rights cause of action and 2) that such an action would be governed by the "outrageous conduct" standard of United States v. Russell, supra. As the petitioner concedes, the lower courts proceeded on

the same assumptions. Pet. 9; Pet App. 15a ("While the due process aspect of entrapment has not yet been brought before the Supreme Court in an action under 28 [sic] U.S.C. § 1983, presumably the same [Russell] analysis applies."). Petitioner did not, of course, challenge the first of these assumptions. Nor did he, then or now, challenge the second; petitioner has always conceded that the "outrageous conduct" standard is the appropriate one. Pet. 15 ("Court is asked to decide whether the law recognizes a civil cause of action based upon outrageous police investigation techniques ...."). Petitioner cannot ask the Court to decide questions which the courts below resolved, at least provisionally, in his favor.

2. The only question that could properly be before the Court is whether the courts below correctly determined that the respondents' conduct was not "outrageous" under Russell. The application of an unchallenged general standard to the facts of a particular case is not, however, a matter that justifies discretionary review by the Court, and petitioner has offered no other reason--such as a conflict among the circuits--that would justify review.

## CONCLUSION

For the foregoing reasons, the respondents ask that the writ of certiorari be denied.

Respectfully submitted,

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